IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION AT CINCINNATI

CHARLES BLEVINS,

Petitioner, : Case No. 1:05-cv-038

-vs- : Magistrate Judge Michael R. Merz

PAT HURLEY, Warden,

Respondent. :

DECISION AND ORDER

This is a habeas corpus case originally brought *pro se* by Petitioner Charles Blevins to obtain relief from his conviction for murder in the Hamilton County Common Pleas Court. Petitioner pled the following Grounds for Relief in his original Petition:

> **State Misconduct:**
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> **Ground raised**: Conviction was obtained in violation of the privilege against self incrimination.
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> **Facts**: The petitioner was in jail when the detective came to question the petitioner who at the time raised his right to counsel before answering questions. During trial the state introduced into evidence that happens to be false but highly prejudicial that the detective during this attempt to question the petitioner the detective noticed wounds in the petitioners [sic] left hand consisted [sic] with a knife fight and not in the right hand. During the sentencing the petitioner revealed to the judge that a wound never existed. The judge stated that it was how the jury view[sic] the evidence. Fact is there wasn't [sic] any pictures or notes about this wound so the evidence was this testimony offered by the State in violation of the

privilege when the petitioner was forced not to testify in his defense during trial.

Ground Two: Conviction obtained in violation of the privilege against self incrimination.

Facts: at no time can the petitioner Fifth Amendments [sic] rights be used against him. The prosecutor repeatedly attacked the petitioners silence because the petition [sic] did not call the police and closed in argument that the silence is guilt and used incomplete DNA and the "Cherry Pie" example referring to silence as guilt. The fact that the petitioner wasn't allowed to testify, the prosecutor created a unfair trial.

Ground Three: Prosecutor failed to disclose favorable [sic] that prevented the petitioner the right to present a defense.

Facts: The withheld Blood down the front steps of the crime scene/the withheld bloody glove that isn't reflected in the crime scene pictures/ the withheld foot prints/the withholding of statements from his witnesses who saw the two men running from the crime scene who state witness testified these men saw the crime. 'T'he importance of the matter is that the area where these men was [sic] seen, they left behind blood and their footprints in a case where the prosecutor claimed it was just the petitioner present and there was only two set [sic] of footprints when he knew that it wasn't. The withheld 911 tape from the actual caller/finger prints/the fact that more then [sic] one state witness saw men running from the scene should have been disclosed/fail to disclose that their state witness was a FBI informant/failed to disclose evidence that could evidence that could have challenged his case effectively resulting in reasonable doubt.

Ground Four: Prosecutor used racial remarks violated [sic] the petitioners civil rights.

Facts: the prosecutor called the petitioner a nigger twice during jury trial and trial counsel objected but the state refused to allow during postconviction to review a tape recorder to prove that the transcripts was [sic] tampered with because even the objection isn't apart [sic] of the transcripts where this violated a Due Process and the right to perfect a [sic] appeal.

Ground Five: Conviction was obtained in violation of the privilege against self incrimination:

Facts: The prosecutor used irrelevant prior crimes evidence violating Due Process by rendering trial "fundamentally unfair" the jury was told that the petitioner was a drug dealer in heroin and was on parole and was under other charges in Franklin County. The fact is the petitioner wasn't allowed to testify so what rights did he have that was protected. The state should have at least gave [sic] notice of their intention to use given the fact it allowed the jury to use this evidence as a "propensity to commit the offense.

Ground Six: Prosecutor may not state his personal belief.

Facts: during closing argument, the prosecutor stated that the petitioner was lying and was guilty because had he been a victim as was told by his planted informant. Had the prosecutor disclosed evidence based upon his witnesses his personal opinion that happens to perjure him, ,the state would not [have] stated that the petitioner killed in cold blood and was lying.

Ground Seven: Prosecutor violated the right to not be convicted with false evidence knowingly.

Facts: state witness Brian Jordan, never lived where he testified to living in order to give direct evidence but was used to support the state case that it was two people present. The Appellate Court in their finding of fact used this witness to affirm the conviction. The petitioner has evidence that the actual person still lives in said place today. There is news coverage of this witness that proves he was false in testimony. The state used another false witness knowingly . . . Conrad Hassle is not the 911 caller. The actual caller voice is on the 911 tape that was not played in court. The state used this witness to set a false time frame but the petitioner has the actual time and location of the caller. This witness testimony was that he did not hear any voices but the tape reveals that the caller heard a woman which support [sic] that the petitioner was not alone with the decease [sic] as well as the withheld evidence. Is the state aloowed [sic] to use perjured testimony?

Ground Eight: Prosecutor has a duty to refrain from improper methods that was [sic] calculated to produce a wrongful conviction:

Facts: The state intentional[ly] withheld evidence under the table during trial that contained evidence that would of [sic] proven that the petitioner did not give bloody shoes to the police which is why trial counsel allowed the bag of evidence to never reach the jury. Had the state corrected trial counsel false statements that placed her client in bloody shoes in a case based upon bloody shoe prints the jury could have placed the petitioner in the six withheld foot prints instead of the bloody foot print. The state first duty is to protect the rights in the interest of justice but this supported his case when he told the jury that the petitioner was covered in blood. The bag of evidence should have been opened and viewed during trial.

Ground Nine: Prosecutor violated the petitioners right to Due Process:

Facts: The state failed to have the actual DNA expert for the state testify at trial to explain that the official report would prejudice the defense which is why many DNA labs simply decline to report on evidence of this type. The report was incomplete and did not meet the standard allowed that never should have been presented to the jury. THE ONLY DEFENSE TO THIS MATTER WAS THAT THE STATE DID NOT HAVE THE TIME TO COMPLETE THE TEST NOR THE MONEY. The state did in fact violate due process and the right to present a defense because the report failed to disclose the withheld evidence that happened to be used in open court to a lay men jury and the fact that the state used a [sic] Expert in training to give her opinion who could not based upon the report, the petitioner was denied the right not to be convicted with false evidence that happens to belong to someone other then [sic] the decease[d] and the petitioner. The prosecutor with held a bloody glove that was not reflected in the report, the prosecutor withheld blood down the front steps of the crime scene that isn't reflected in the report, the report did not reflect the photo of a smear that was claimed to be blood, the petitioner never had the chance to test these items that was [sic] given to the jury and the very fact the Appellate court in their finding of fact did state that the petitioner blood is on items that isn't reflected by their very own report violates the due process where the petitioner can never properly prove this evidence was false and the trial court refuses to give a [sic] evidentiary hearing during post conviction. This miscarriage of justice did violate due process causing the trial to be fundamentally unfair denying the petitioner Equal protection of the Laws where it was impossible to make this case a meaningful adversarial testing process. The petitioner has a DNA expert who submitted a [sic] affidavit that the states official report should have never been allowed in Court. The report prejudiced the petitioner that cause

[sic] a wrongful conviction.

Ground Ten: Prosecutor violated the petitioners U.S.C.A. Consti.Amends.5, 6, Fed. Evid.Rules 401, 403, 28 U.S.C.A.

Facts: The state used and planted a F.B.I. informant after knowing the petitioner raised his rights to have counsel present during police interview. This witness was a [sic] actor for the government who disclosed prejudicial evidence and was led in testimony by the state. This witness was overheard by two of the counties [sic] deputies that he was told what to say which is why the state asked this witness did the petitioner admit to killing his friend . . . it was the longest 60 second [sic] ever before he said no because he knew the deputies over heard him but the fact is that he was planted in violation of the 5th and sixth amendment and used to disclose that the petitioner was a convicted felon and this witness gave his opinionated testimony as if he was a [sic] expert.

INEFFECTIVE ASSISTANCE OF COUNSEL:

Ground 11: Counsel failed to object to the violation of the petitioners privilege against self incrimination.

Facts: The state was aware that during the detective attempt to question the petitioner while in custody, the petitioner raised his rights fearing anything disclosed would be misread but the facts are; counsel should have objected to the testimony by the detective who stated that the petitioner raised his Fifth amendments and Sixth amendments then tells the jury that he saw a wound in the healing stages consisted [sic] with a knife fight. The petitioner was alarmed by this testimony but felt he could demonstrate that the wound never existed once he took the stand being fully aware that in any criminal or civil proceedings this right protects against any disclosures that might be used as evidence therefore counsel was ineffective because it allowed the jury to place the weapon in the petitioner left hand and use the right to silence at that time, to allow the jury the [to] infer guilt. Today the petitioner do [sic] not even have a scar.

Ground 12: Failed to object to the violations of the petitioners Fifth Amends:

Facts: The use of silence as substantive evidence of guilt applies equally before and during trial and even before arrest. The prosecutor calculatingly used a "CHERRY PIE" example referring to silence where he implied blood as the cherry over his kids mouth refusing to talk because they were guilty due to the evidence of the pie around their closed mouth. The prosecutor used the petitioners pre arrest and post arrest repeatedly during trial but the pointing of his finger during closing arguments where he used the silence as guilt should have been at least objected to by counsel under evidentiary grounds of Ohio rules of relevant evidence 401,403, due to the fact the petitioner was not allowed to testify.

Ground 13: Counsel threaten the petitioner, denying him the right to present a defense by testifying at trial:

Facts: counsel who was timely informed who committed this crime from the petitioner and the state claimed it wasn't any eyewitnesses to the crime by withholding evidence that his state witnesses saw two men running from the scene and another state witness testimony was that two men ran down the front steps stating not to go up stairs because it looks crazy “they are fighting” now these men are important to this case because its [sic] that exact location of blood that was withheld and the exact location where the petitioner told counsel the killer ran. Counsel refused to investigate because she filed a motion to Withdraw after learning the name of the person who ws [sic] fighting the decease[d]. She knew the fighter which created a conflict of interest, she represented him. Counsel threaten[ed] the petitioner not to testify and, he believe[d] she would walk out because of the motion and the petitioner was under duress where the proceedings was [sic] stopped because the petitioner was throwing up blood and urinating blood. With the facts being given to counsel by state witnesses to support the petitioner statements why would a sound minded lawyer deny this right when the petitioner was the only one who was willing to tell what happen since the state withheld evidence and the trial court refuse[d] to satisfy itself that the waiver was from the petitioner. THE COURT WITNESSED THE BATTLE BETWEEN COUNSEL AND THE PETITIONER. The petitioner also could have proved that the wound never did exist in his left hand. Its [sic] obvious that it was aqreed to testify which is why she never objected to those violations of the Fifth and Six[th] amendments.

Ground 14: Counsel failed to investigate denying the petitioner the right to present a defense.

Facts: Had counsel investigated the state expert witness before trial, counsel would of [sic] known about the six withheld foot prints that only came out during cross examination where afterwards counsel never mentioned again but taking those foot prints in its logical conclusion that others were present when a fight took place. (2) Had counsel investigated another expert for the state she would of [sic] known of the withheld bloody glove in the location where the two men ran and its strange that its not even in the crime scene pictures. (3) Had counsel investigated counsel would have never told the jury that it was her clients blood down the front steps and the back but taken this in its logical conclusion those men seen by the state witnesses left blood (4) Had counsel at least investigated counsel had available defenses but gave none but did disclose false evidence against her client (5) Had counsel investigated counsel would of [sic] known the FBI informant was planted in violation of said rights (6) Had counsel investigated counsel would have known that the state witness perjured himself and the state knew it because all she had to do was listen to the 911 tape (7) Counsel was timely informed by E-mail that another state witness was refusing to testify because he was paid drugs to lie on the petitioner where today the petitioner has e-mails, counsel could have proven that another state witness was a false witness and the judge cant [sic] be the judge of that, it was counsel duty to investigate but she decided to simply withdraw by filing a motion to withdraw before trial (8) Had counsel investigated counsel would of [sic] known the decease[d] stab wounds consisted of a right handed person and the reason why the state claimed wounds was in the left hand of the petitioner that was false.

Ground 15. Counsel failed to object to damaging evidence.

Facts: Counsel knew that the state never gave pretrial notice of his intent to use the petitioner[‘s] past crimes as evidence, counsel should have objected under criminal rule 401,402,403,404,(b) the jury heard that the petitioner was a drug dealer in heroin and was on parole and under more charges. cousel [sic] sould [sic] have objected.

Ground 16: Counsel was ineffective failing to object:

Facts: counsel knew that the petitioner made a news coverage tape wanted to help in the investigation if the news met with his parole officer because the petitioner feared the cinti, [sic] police would kill him, the petitioner requested inside the tape for a lie detector test and stated that he made it out alive. Counsel should have objected to the jury instruction that allowed them to infer guilt with the fact the petitioner did not come forward and ran do [sic] to his fears and shock but wanted to assist in any investigation but under conditions with in mind he had rights. Everyone ran and testimony by the state witness proved no one called the police and the petitioner wasn't under arrest nor a suspect at the time, he was only charged after raising his rights after being in jail for probation violation. The petitioner requested the FBI and a lawyer which caused him to be charged then at that time so how was the inference used as guilt along with the silence of the Fifth and Sixth amendment. Counsel should have objected and offered this tape as evidence to show that the petitioner never fled from justice.

Ground 17: Counsel gave false evidence against the petitioner:

Facts: In a case where the state based its case on the assumption of two foot prints and withheld the others, counsel relieved the state burden of proof when she placed her client in a pair of bloody shoes . . . counsel told the jury that the petitioner gave a pair of bloody shoes to the police during closing arguments leaving that upon the minds of the jury to deliberate and knowing caused a wrongful conviction in her over all duty. The petitioner never gave any bloody shoes to the police and the prosecutor did not correct this falsehood in the interest of justice because there was plenty false evidence and the bag of evidence left under the table by the state that held clothing was never viewed by the jury who returned a verdict in 20 minutes. The burden of proof was shifted to the petitioner by counsel who relieved the state of their burden.

Ground 18: COUNSEL WAS INEFFECTIVE DENYING THE PETITIONER THE RIGHT TO HAVE COUNSEL WHO HAPPENS TO BE A DNA EXPERT:

Facts: THE SIX[TH] AMENDMENT RIGHT TO COUNSEL DOESNT JUST MEAN A LAWYER. In a case where the jury had to consider a [sic] incomplete official lab report based on DNA offered by the state, a defense expert in this field could have counseled the jury because according to the State misdeeds they did not have the actual conductor of the lab report there to testify but used a DNA expert in training who COULD NOT give her full opinion based upon the report to include or exclude that it was others blood present besides the decease[d] and the petitioner who also is a victim in this case. Counsel was ineffective and insufficiently familiar with the report to make a [sic] adequate judgment about whether to object to the admission of such highly prejudicial evidence where the words still haunts the petitioner when this expert simply stated that they did not have the T!ME NOR THE MONEY to complete the tests! counsel being without the education in this field should have presented a DNA defense COUNSELOR to effectively demonstrate the prejudice of the report. counsel was incompetent by stipulating this evidence that substantially affected the rights of the petitioners due process when the court asked counsel was she in the position to make this call to stipulate this evidence she was unfamiliar with where today the Appellate Courts in their finding of fact also claimed blood in certain area was the petitioners when in fact the report states differently which proves the prejudicial effects of this report goes beyond the jury. The proof of her ineffective assistance is from her own mouth that also proves she did not investigate . . . this incompetent counsel told the jury that blood of the petitioners was in both location "DOWN THE FRONT STEPS AND THE BACK", now the front steps is where the state witnesses placed those men running from the scene which was not disclosed, further this incompetent counsel tells the jury that the petitioner gave bloody shoes that do not exist, then this counsel shows every picture of the bloody crime scene emotionally tampering with the jury and STATED THAT these pictures are enough TO BURY ANY DEFENSE! untested blood! which gave relief to the states burden . . . at this time counsel told the jury THAT THIS WAS MURDER, LOOK AT THE BLOOD, IT WAS INTENTIONAL! this relieved the state of the element of first degree. Counsel told the jury that other items of DNA belonged to the petitioner but the report states differently. Counsel was never in the position to stipulate this report because she was incompetent and should have presented a DNA defense counselor to assure the reliability of the tests due to items that was not approved by the FBI standard of 13 strands which is why the state expert could not give her full opinion. Counsel should have at least investigated and interviewed the actual conductor who was not at trial or counsel should have interviewed the expert who was presented before trial and by her own actions proved she was incompetent and never consulted with any expert to obtain advise [sic] on how to proceed so therefore based upon counsel giving false evidence relating to DNA and showing every picture of the scene that she never investigated because she would of [sic] known that the bloody glove was in the same location those men ran. The petitioner now have [sic] a defense DNA expert who stated that many DNA expert[s] simply decline to give a report on evidence of this kind which is safe to say why the actual conductor wasn't there to testify. She never intended to investigate and present a defense to prepare for trial which is proven by the fact she FILED A MOTION TO WITHDRAW!

Ground 19: Counsel Jeffery Witt, denied effective assistance that violated the right to counsel:

Facts: the petitioner was appointed counsel until he was approached by Jeffery Witt and Cathy Adams, who claimed to have followed the case and if the petitioner hired them they would hire a investigator and present a DNA expert to test the blood down the front steps where the petitioner stated the men ran and came out during trial. The petitioner paid this counsel from his inmate account for starter fee's 4,500 + ? and later paid in cash at times Cathy Adams picked up cash in parking lots. The petitioner gave them statements from his appointed counsel that could have proven that the state never had a weapon and state witnesses statement that was different during trial. Jeffery Witt, stated that the presiding judge Davis, was on vacation in Florida where Counsel Cathy Adams lives and the blood has been disclosed to the judge. The petitioner was being extorted by this counsel who made only one visit to the jail and continued to receive money from the petitioners family but placed collect call blocks on their phones leaving the petitioner to investigate on his own. The fact is that this counsel along with Cathy Adams, who finally responded to E-Mails where the petitioner requested their service and explanation as to why they never keep their words to keep the petitioner informed to the developments in the case and where is the investigator they claimed to have and would be by to receive the evidence. Jeffery Witt, was never seen again nor did he show up for trial. It has been revealed that these lawyers did not have their own firm and was indeed Public Defenders and did receive money from the court and the petitioner by using a Sham Legal Process. He decided to withdraw without notice violating the rights of the petitioners Six[th] Amendment.

Ground 20: Ineffective Assistance of counsel:

Facts: Cathy Adams and Jeffery Witt both was [sic] timely informed of the men and person who was fighting the decease[d] over a prior robbery the decease[d] was mistakenly thought to have committed, counsel failed to investigate because of a conflict of interest, she knew the person who was fighting and the cause of the decease[d] death . . . she filed a motion to withdraw.

Ground 21: Ineffective Assistance of counsel:

Facts: Due to the lack of communication between the petitioner and these lawyers the petitioner was forced to attempt to investigate himself and obtained the criminal records of the state witnesses and affidavits from one state witness who stated that he felt bad because he has a drug problem and A State witness was paying them to lie on the petitioner. The petitioner made contact by another to reach counsel in Florida who responded by e-mail telling the petitioner more excuses why she can[']t visit, counsel stated that her investigator would be by to get the evidence and witnesses names. These affidavits was [sic] and are dated before trial but never investigated or at least interviewed by these lawyers. Counsel made the petitioner believe that her investigator would handle this when he arrive . . . the sad facts are; counsel knew or should have known that she was misleading the petitioner because she never took the steps to assure that this mysterious investigator could receive the material because HE WAS NEVER ALLOWED TO ENTER THE JAIL BECAUSE OF HIS CONVICTION AS A FELON. Counsel should have been honest and just gave [sic] the petitioner his money back knowing she has never investigated and filed a motion to withdraw. One affiant stated that she could pick the person out in a line up that she knows was in fact involved. Another affidavit stated that the killer admitted to him that he did not mean to kill him and fears that the petitioner was going to inform on him. By counsel depending upon a investigator that was not allowed in the jail and caused these witnesses to become lost and available defense witnesses was not used, counsel stopped responding to family e-mails and the petitioner stated facts in those e-mails that could have been proven and throughout the trial never once did counsel at least hint at these facts, she was informed that the state witnesses was being paid which is reasonable to believe why the state witnesses committed perjure [sic] and the state knew it. It was ineffective assistance to hire a[n] investigator like this and to make the petitioner believe in his arrival soon. The petitioner have [sic] e-mails.

Ground 22: Ineffective Assistance of counsel:

Facts: The petitioner continued to try to defend himself by filing a MOTION FOR A[N] EVIDENTIARY HEARING BEFORE TRIAL. Because there was a suppression issue and the relief requested was to stop the official DNA report that held prejudicial evidence and to suppress certain crime scene pictures and to suppress the weapon that was offered because the prosecutor claimed to not have recovered a knife and it was used in open court and the state expert could not give her full opinion to exclude or include others. The petitioner wanted to test the reliability of the DNA. Counsels was [sic] ineffective because they refused to make the court rule on these pre-trial motions that was never granted or Denied in violation of criminal rule (12)e (B)1(5) a motion made pursuant to division (b)(1) to (b)(S) of this rule shall be determined before trial. It was counsel duty to investigate and discover that there was and is a suppression issue and these counsel refused to file any motions instead counsel filed a motion to withdraw and the other counsel simply decided to not show up.

Ground 23: counsel was ineffective:

Facts: The petitioner has a disability that even is recorded in the police report. Prior to the fighting that left a man dead, the petitioner was shot at close range in his right arm. During the first and only visit counsel claimed to locate the medical records but failed, however the petitioners wife did and wanted his doctor as a witness, counsel who lived in Florida told the petitioner that her investigator would be by to take pictures of the petitioners left hand because the state have [sic] a witness who claims it was a left hand and saw wounds consisted [sic] in the petitioner hand. He never came to take any picture cause [sic] he wasn't aloowed [sic] inside the jail . . . the petitioner received the medical records and forward[ed] them to counsel home address and claimed that she admitted the medical records into evidence but she lied, and left the records in hall of the court and when trial was over the records was [sic] given to the petitioner by a deputy. During postconviction through counsel it was learned that a left hand never was used and which brings to light the importance of this evidence which is why a lie was created about the wound consisted [sic] with a knife fight in the petitioners left hand. Counsel refused to talk with postconviction lawyer. The transcripts proves that she lost defense exhibit 2 during trial. WHY WOULD A COMPETENT LAWYER LEAVE THIS EVIDENCE IN THE HALL AND WAS AWARE OF THE POLICE REPORT THAT HELD THE DISABILITY. Counsel failed to present available evidence.

Ground 24: Ineffective assistance of counsel:

Facts: failed to object to admitted evidence by the state of the search warrant that contained state witnesses statements who was not on the witness stand. This exposure of highly prejudicial statements supported the prosecutors opening arguments that the petitioner was covered in blood and statement about a wound being in the hand of the petitioner. By not objecting counsel deprived the petitioner [of] the right to confrontation, cross examination and assistance based on HEARSAY.

Ground 25: Ineffective assistance of counsel:

Facts: Counsel failed to request a mistrial due to the irregularities in the proceedings that rendered the trial "fundamentally unfair" counsel finally objected when the jury informed the court that they were having problems following the testimony of the state experts due to the courts failure to separate the state witnesses who were fighting amongst themselves which created a unfair trial. The transcripts is [sic] full of fighting because certain witnesses for the state did not say what they were paid to say like the e-mails to counsel revealed and had her investigator been allowed to enter the jail if he existed then the defense could have presented evidence. These witnesses was [sic] self admitted crack users and was high on the stand and created a mob influence that made the jury lose focus in following testimony. Counsel should have declared a mistrial. She never asked any of them was [sic] they being forced to testify.

Ground 26: Ineffective Assistance of counsel:

Facts: Counsel failed to investigate and present a FBI agent for a witness who could have told the jury that the petitioner came to them prior to the fighting that left his friend dead. The petitioner reported a potential crime that would of [have] caused the death of a human. A[n] investigation took place a[nd] the petitioner was given a tape recorder which was left at the crime scene. Had counsel called this witness or at least investigated this witness, it would have proved the petitioner is not a killer.(2) counsel was ineffective because this witness could have supported the fact that before this fight that left a man dead, a female teenager was shot in the face because she refused to tell where the decease[d] lived and the shooting went unsolved. She was shot just for being seen with the decease[d]. The petitioner explained to counsel that the files of this investigation could be obtained through the freedom of information act. The record shows that even though the police report with held this request and was denied at trial by the detective until the petitioner had to force counsel to prove he was lying by looking at the report, he then admitted that the petitioner during questioning raised his rights to counsel and to have the FBI present. More importantly the motion for discovery held facts where the petitioner told the police before arrest that he had a card from the FBI and wanted to report this crime the petitioner is wrongfully convicted of, had counsel investigated and called these witnesses the petitioner character would had never been degraded the way the prosecutor did just to win this case. Counsel didn't care and decided to withdraw.

Ground 27: Ineffective Assistance of counsel:

Facts: Counsel failed to call Stephanie Dangerfield to the stand. This witness was a listed state witness, the girlfriend of the decease[d], Robert White, She could have testified to the relationship between the petitioner and White, that they were indeed friends and this witness wasn't used by the state after after [sic] learning her high regard for the petitioner and that he tried to get Robert White to move before this crime took place, the person who robbed these men was Tay, not Robert White! a fight broke out, counsel should have investigated and called this witness, she was there in court, the state knew not to put her up there after learning her convictions.

Ground 28: Ineffective assistance of counsel:

Facts: Counsel failed to have a state witness declared incompetent to be a state witness Brain [sic] Jordan was a mental case, this witness not only lied under oath and the state knew it by allowing this witness to perjure himself by claiming he lived in apt.33 in order to state what he heard and saw blood in front of his door but the crime scene pictures reveals [sic] no blood ever was present but it was in front of apt.33 who another state witness happens to live but refused to come to trial after a woman was shot to death in the same location of Robert White, the decease[d] in this case, because she was there on the night the fight took place, the state allowed Jordan to become Herny [sic] Bomar, Had counsel declared this witness to be incompetent by cross examination of his medical history for mental health she would have know [sic] that Jordan stands in the middle of the streets for hours at a time in a human cross screaming jesus is coming. Before trial the prosecutor paid for Jordan to have socks and other iteems [sic] to clean him up for trial due to what he was wearing and paid for his meals. This witness was a false witness was incompetent to testify which is why he was the only one who heard gun shots or its because the people who was paying state witness did not know that the decease[d] died from knife injuries. Jordan claimed on stand to be a actor and a musician and a singer! which is also a lie, he is sick.

Ground 29: The Judgment of the trial court is against the manifest weight of evidence. Where the record on appeal demonstrate that the trier of fact clearly lost its way in rexolving [sic] conflicts in the evidence and thereby created a miscarriage of justice, the conviction should be overturned.

Facts: First a review of the state case shows that they did not have overwhelming proof of the petitioners guilt. The [State] could only place the petitioner there and claimed no one saw this crime, however the state withheld that others was [sic] present but rush to judgment because the petitioner requested his rights to remain silent until a lawyer and the FBI was present. The jury lost its way by voicing that they could not follow the testimony due to the courts refusal to stop the fighting amongst the state witnesses. The conflict in evidence is not just due to the misdeed of the state but the petitioners very own counsel gave conflicting false evidence against her client during trial that such errors affected the results of the proceedings in this case. The miscarriage of justice is that the petitioner has challenged and proven that evidence that was presented was withheld and improperly used as weight to hold a conviction where the Appeals Court stated in their finding of fact that blood that was untested belonged to the petitioner. The weight of evidence from the state was simply false and if proven the manifest weight of evidence will be reduced leaving the state case as it was before the petitioner raised his rights. The burden of the element as charged was relieved by trial counsel leaving the petitioner without counsel during trial and the trial judge cannot investigated himself to determine the credibility of false witnesses, it was counsels duty to prepare that cause the conflict in resolving issues cause the withheld evidence strongly weighed in favor of there being another party the withheld evidence in violation of the Brady strongly weigh in favor of there being another party or parties who committed the offense. Foot prints in blood that was [sic] withheld other then [sic] what the state disclosed, two men running from the scene that was only disclosed by the State very own witnesses and in that location was blood that happened to be confirmed by the petitioners very own. counsel that it belonged to the petitioner the State could only rebut this fact by offering proof that the petitioner was there at the scene, a fact which in and of itself is deserving of very little weight. The credibility of the state witnesses, that could be proven to be false had a evidentiary hearing took place during post conviction, the jury lost its way and ignored the manifest weight of evidence. These errors on the behalf of the jury do mandate reversal and a new trial for the petitioner.

Ground 30: THE EVIDENCE ADDUCED AT TRIAL WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE CONVICTION RENDERED BELOW IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT THE EVIDENCE DID NOT ESTABLISH EACH AND EVERY ELEMENT OF THE OFFENSE BEYOND A REASONABLE DOUBT.

Facts: In a case where state witnesses was [were] describing a Fight is not a case of murder where the evidence shows a crime of passion. No one knows how this fight started had had the state disclosed who those two men that more than one state witness testified to running away who was actually those involved, the essential element of murder was proven by the petitioner counsel when she stated that this offense was “intentional” and that the crime scene pictures are enough to bury any defense relieved the state of their BURDEN OF PROOF, the evidence violates a criminal defendants right to due process and the right not to be convicted with false evidence, and had the evidence been properly submitted and the blood where these men ran wasn't stated to be the petitioners or the counsel for the petitioner had not placed the petitioner in bloody shoes that doesn't [sic] exist, the six withheld foot prints could have been the petitioners who was at the wrong place at the wrong time and needed to testify because the insufficiency of the evidence belonging to another if proven the reasonable doubt is presented and the conviction cannot stand because one must be found guilty without a reasonable doubt as well, the evidence as a matter of law is insufficient to sustain the conviction and counsel's deficient performance PREJUDICED the petitioner at best that did not render the trial a reliable adversarial testing process that caused a wrongful conviction where even the Appeals Court used evidence that don’t [sic] exist nowhere but in testimony and a official DNA report that states differently. A new trial should be held. The question should be how a state witness knew the exact injuries of the other victim in this case, Gwen Barden knew on the night in question the cause of death, this same witness stated that one of the men ran past her.

Ground 31: Ineffective assistance of Appellate Counsel:

Facts: The appellate counsel refused to raise ineffective assistance of trial counsel because they are from the same work place and did not want to raise claims the petitioner requested and counsel stated that he did not see any wrong so therefore State misconduct wasn't raised because that would of [have] proven he had to raise ineffective assistance of trial counsel. The petitioner has a written letter from appellate counsel stating and prove it was a factor beyond the petitioners control. He obvious[ly] felt it was allowed to use the petitioners silence against him and reveal that the petitioner was a convicted felon and that it was okay to use a FBI informant as well as the trial court did not satisfy itself that the petitioner did not waive his right.to testify. This appellate counsel did not send a complete copy of the transcripts nor did he allow the petitioner to review his brief before he submitted it and by the case being a serious charge, the petitioner always had only 15 pages being forced under Locals rules (Accelerated Calendar) that cause the petitioner to not have an adequate, full and fair procedure where he could properly raise his claims. Appellate counsel was ineffective by refusing to raise all of the petitioners claims due to his working relationship with trial counsel because this appellate counsel knew or should have known that the petitioner can not raise claims outside of the record in post conviction and appellate counsel review of the record did notice that a suppression issue of evidence was made by the petitioner according to the docket sheet that was not ruled upon nor enforced by trial counsel where the petitioner demonstrated that the official DNA report was wrongfully presented and disclosed false evidence in many ways. (1) The search warrant dated on April 16th, 2001 where it states that 3 of 14 submitted blood smaples [sic] or lifts have not been identified. Which is logically concluded that the blood that was withheld needed to be indentified [sic]. However, it was decided to be suppressed [sic] because if the petitioner was given a fair chance to litigate during an evidentiary hearing before trial or after, it would have been revealed that the petitioner is being wrongfully charged based on the evidence because the states' official DNA report held that they had the petitioner's blood during the month of Feb. 26th 2001. The motion for an evidentiary hearing was needed and was ineffective assistance of both trial and appellate counsel because the facts were in their face and the question of just how did they unlawfully obtain the petitioner's blood to be reported in their Feb 26, 2001 DNA report when the warrant was issued on April 16th carried out the next day where the petitioner allowed his blood to be taken. Whose blood is and was used to convict the petitioner? 3 of 14 was never indentified [sic] and was withheld and wrongfully presented to the jury as the petitioners. It was the duty of

> trial counsel and the appellate counsel, not the petitioner, was responsible for failing to raise a 4th amendment claim but instead trial counsel did file a motion to withdraw before trial demonstrating her lack of concern for her client. The petitioner never recieved [sic] records of the motions filed after trial such as a motion for a new trial which probably failed to raise these claims again. THESE ARE THE FACTS AND THE DNA REPORT WAS DEFECTIVE IN MANY WAYS THAT CAUSED A WRONGFUL CONVICTION. The significance of the search warrants is, it has the withheld blood down the steps where those men ran from the scene and testified by state witnesses.
>
> **GROUND 32**: Trial court: was in error for failing to allow the petitioner to amend his petition for post-conviction.
> FACTS On June 24,2003, the petitioner filed a motion to amend to the trial judge who has demonstrated before trial that he will never answer any motions from the petitioner, he will simply ignore them, never granting nor denying, which robbed the petitioner, may be a right to appeal his decision if he denied . . . .

(Petition, Doc. No. 1, PageID 7-17.)

By Motion to Amend, Petitioner added the following Grounds for Relief:

> **Ground 33** Ineffective Assistance of counsel:
>
> **Facts:** Failing to offer any mitigating factors defined by statute (1) Whether the victim of the offense induced or facilitated it ••• based on state witnesses it was a fight. (2) Whether it is unlikely that the offense would have been committed but for the fact a defendant was under duress or strong provocation . . . the state claimed the petitioner was using drugs but withheld evidence that would of proved differently in their toxicology report or whether at the time of the crime was under some mental defect disease ect [sic]. •••• in a case where the petitioner witnessed a fight that left him in shock and fear and that fear and shock was used or looked upon as guilt because he raised his rights and the state claimed the mind state of the petitioner, counsel should have offered mitigating evidence. The petitioner is addressing the claim based on the state case only who withheld and failed to investigate their own witnesses who described two men claiming a fight but those men was the killers however this testimony support a fight and the petitioner was at the wrong place at the wrong time, Counsel was asked was there any mitigating evidence she did what she has done throughout trial ••

refused to offer any evidence based on her failure to investigate but she did request for a lesser offense under rule 29 before she learned that the state violated rights by failing to disclose “and for a critical time” actively suppressing eyewitness evidence that would have contradicted the prosecutor case for murder and why wasn't these eyewitnesses reveal or came forward because they was not just eyewitnesses to a fight, they were the fighters and the state planted informant claimed that the decease did rob someone and it came back on him ••• another state witness Brain [sic] Jordan who heard gun shots claimed to have heard voices and the other one telling Robert White that they wanted their money and that he got his like they got theirs meaning what? Pay back so why not offer mitigation based upon the state case. The petitioner explained this to his appellate counsel who did not raise this claim.

Ground 34 Ineffective assistance of counsel:

Facts: failed to cross examine state witness General Smith who happened to be a planted informant in violation of the rights of the petitioners 5th and 6th amendment. This denied the right to Confrontation as well. This witness stated that he left the jail and came back and the date will reveal that the petitioner already raised his right to have counsel and the FBI present before questioning. Counsel could have after being aware that he was in concert with the state being a actor for the state, counsel failed to call to the stand available witnesses who knew that the state was aware of this witness status. Mr Richard Wedell, the petitioners first lawyer. Counsel could have investigated the phone records that would prove this witness never called the petitioners phone from his phone or investigated jail phone recordings at that time to prove his lies. Counsel failed to call another witness who was the only witnesses on the defense witness list. These witnesses were county deputies who heard this witness state that he was being told what to say. His information about the case was given to him to help get information out of the petitioner and this witness offered favors to other inmates to help gain information. Counsel failed to request the tape from the wire he worn [sic]. It would of also proven [sic] the petitioner never talked to this informant. Criminal Law key 662.1,662.7 by denying and violating the 6th amendment right to physically face and cross examine. Counsel further proved her ineffectiveness when she failed to object to this witness given his expert opinion to how many people where [sic] present during the crime and more importantly counsel should have objected to this witness telling the jury the past criminal history of the petitioner and that he was under more

> charges in another county. Under evidentiary rule 401,402,403,404(b) Counsel was ineffective for refusing to reveal the state violated the 5th and 6th amendments and the addiction evidence to support and challenge this witness who prejudiced the petitioner right to a fair trial, counsel knew she did not want to defend this case which is why she filed a motion to withdraw based upon her unprepared [sic] duty to defend, entirely failing to subject the state case to a meaningful adversarial testing process which makes the process itself presumptively unreliable under Criminal law key 641.13(1).

(Motion to Amend, Doc. No. 5, PageID 38-39.)

Procedural History

Petitioner was indicted April 12, 2001, by the Hamilton County grand jury on one count of murder for the death of Robert White. A jury found him guilty and he was sentenced to a term of fifteen years to life, the term he is now serving in Respondent's custody. Represented by new counsel, Blevins appealed raising two assignments of error, insufficient evidence and conviction against the manifest weight of the evidence. The court of appeals affirmed. *State v. Blevins*, No. C-020068, 2002 Ohio 7335, 2002 Ohio App. LEXIS 7227 (Ohio App. 1st Dist. Dec. 31, 2002). The Ohio Supreme Court declined to hear a further appeal.

Represented by new counsel, Blevins filed a petition for post-conviction relief under Ohio Revised Code § 2953.21 raising claims of ineffective assistance of trial counsel and prosecutorial misconduct. The common pleas court denied the petition without an evidentiary hearing on June 27, 2003. Five days after the trial court's decision, Blevins moved to amend to add eleven new grounds. As of the time the Return of Writ was filed, the trial court had not ruled on that motion (Return of Writ, Doc. No. 12, PageID 293).

Blevins appealed the denial of his post-conviction petition to the First District Court of Appeals which affirmed the judgment on June 30, 2004. *State v. Blevins*, No. C-030576 (Ohio App. 1st Dist. June 30, 2004)(unreported, copy attached to Return of Writ, Doc. No. 12, Ex. 17, PageID 224-225). The Ohio Supreme Court declined further jurisdiction.

On March 31, 2003, Blevins filed, through counsel, an application to reopen his direct appeal under Ohio App. R. 26(B) to raise claims of ineffective assistance of appellate counsel. Blevins supplemented this application twice *pro se*. The court of appeals struck the *pro se* filings and denied relief on the March 31, 2003, represented filing. Blevins did not appeal to the Ohio Supreme Court.

Blevins filed his Petition in this Court on January 20, 2005, pleading the first thirty-two Grounds for Relief quoted above. He added the last two quoted claims by Motion to Amend (Doc. No. 5). Respondent filed the Return of Writ on July 21, 2005 (Doc. No. 12). Petitioner filed his Traverse (Doc. No. 22) on November 9, 2005.

On September 22, 2006, the reference in the case was transferred from then-Magistrate Judge Timothy Black to the undersigned (Doc. No. 23). Shortly thereafter, the Court appointed Mark Godsey, Director of the University of Cincinnati Innocence Project, as counsel for Petitioner (Doc. No. 31). In December, 2006, the parties unanimously consented to plenary magistrate judge jurisdiction under 28 U.S.C. § 636(c) and the case was referred on that basis (Doc. No. 33).

The Court then stayed the case to permit exhaustion of Blevins' motion for post-conviction DNA testing and to obtain a ruling on his motion to amend his post-conviction petition (Doc. No. 39). After the DNA petition was denied, the Court, with Petitioner's approval, substituted attorney Jennifer Kinsley as Petitioner's counsel (Doc. No. 49 and notation entry granting). The

Warden's counsel filed on November 6, 2009, a Response to Order to Show Cause demonstrating that the Hamilton County Court of Common Pleas had decided the motion to amend (Doc. No. 54). The Court continued the stay of proceedings pending appellate review (Doc. No. 56) which was dissolved April 14, 2011, after the appellate process was complete (Doc. No. 61). Because appointed counsel has assumed representation of several death row inmates, she asked for and was granted substitution of new counsel, Wendy Calaway, on May 20, 2011 (Doc. Nos. 65, 66).

New counsel sought discovery which was granted in part and denied in part (Doc. Nos. 78, 82). On July 11, 2012, the Court ordered merit briefing (Doc. No. 95) which has now been completed (Doc. Nos. 98, 99) and the case is ripe for decision.

Analysis

Petitioner initially filed a total of thirty-four numbered grounds for relief. Although not set out separately, many of those grounds effectively contain sub-claims. Neither counsel has re-briefed in their Merits Briefs all of those claims, but rwtherrhas concentrated on the claims affected or potentially affected by this Court's grant of discovery. The claims dealt with in the Merit Briefs will be discussed first, then the claims pled *pro se* by Mr. Blevins.

Grounds for Relief Argued by Counsel

Ineffective Assistance of Trial Counsel

Mr. Blevins pleads ineffective assistance of trial counsel as a claim for relief in Grounds Eleven to Twenty-Eight, Thirty-Three and Thirty-Four. Counsel concentrates on a limited number of these claims.

The governing standard for ineffective assistance of counsel claims is found in *Strickland v. Washington*, 466 U.S. 668 (1984):

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. at 687.

With respect to the first prong of the *Strickland* test, the Supreme Court has commanded:

> Judicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's

> conduct falls within a wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

466 U.S. at 689.

As to the second prong, the Supreme Court held:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to overcome confidence in the outcome.

466 U.S. at 694. *See also Darden v. Wainwright*, 477 U.S. 168 (1986); *Wong v. Money*, 142 F.3d 313, 319 (6th Cir. 1998); *Blackburn v. Foltz*, 828 F.2d 1177 (6th Cir. 1987). *See generally* Annotation, 26 ALR Fed 218.

Ground Thirteen: Failure to Allow Blevins to Testify

Certainly a criminal defendant has a constitutional right to testify in his or her own defense. *Rock v. Arkansas*, 483 U.S. 44 (1987), *citing Ferguson v. Georgia*, 365 U.S. 570 (1961)(including history of development of the right). As Petitioner's counsel acknowledges, however, the issue in this case is not whether the trial court would have allowed Blevins to testify, but "whether trial counsel's performance in advising Mr. Blevins not to testify, ignoring his requests to take the stand and failing to call him as a witness fell below the standard of reasonableness" set in *Strickland*, *supra*. (Merit Brief, Doc. No. 98, PageID 1587.)

This claim was presented to the Ohio courts as part of Blevins' first petition for post-conviction relief. It was denied by the trial court and the court of appeals affirmed, holding the trial court had not abused its discretion in denying this claim. *State v. Blevins*, No. C-030576 (Ohio App. 1st Dist. June 30, 2004)(unreported, copy attached to Return of Writ, Doc. No. 12, Ex. 17, PageID 224-225).

Because the claim was decided on the merits by the state courts, this Court must defer to the state court decision unless that decision is contrary to or an objectively unreasonable application of clearly established precedent of the United States Supreme Court. 28 U.S.C. § 2254(d)(1); *Harrington v. Richter*, 562 U.S. ___, 131 S. Ct. 770, 785 (2011); *Brown v. Payton*, 544 U.S. 133, 140 (2005); *Bell v. Cone*, 535 U.S. 685, 693-94 (2002); *Williams (Terry) v. Taylor*, 529 U.S. 362, 379 (2000). Trial counsel's advice to Blevins – that he should not take the stand because of his criminal record – was sound advice. As stated in his Affidavit, the testimony Blevins he would have given placed him at the scene of crime, potentially engaged in three-way sex with a woman who did not want to be engaged in that activity, i.e., without her consent, which might have sounded like rape to the jurors (Blevins Affidavit of January 2, 2003, Doc. No. 97, PageID 1583). As he presented it in his petition for post-conviction relief, it would not have offered any explanation how his blood got on the murder weapon.

We have no admissible evidence of what his criminal record was. Petitioner deposed his trial attorney, Cathy Adams, on permission from this Court, but that deposition cannot be considered on the question of the reasonableness of the state courts' decision. *Cullen v. Pinholster*, 563 U.S. ___, 131 S. Ct. 1388, 1400-01, 179 L. Ed. 2d 557 (2011). Respondent replied with an extremely damaging public record showing the convictions were for robbery and drug abuse and he had spent the prior ten years in prison for those crimes and was on parole at the time White was killed. But *Cullen* applies to the State as well, so the actual record cannot be considered. Suffice it to say that advice to a criminal defendant not to take the stand for fear of cross-examination about a prior felony record is extremely common advice from defense counsel. Petitioner has failed to show that the advice in this case was so bad that the Ohio courts' decision was an objectively unreasonable application of *Strickland*. Ground Thirteen will be dismissed with prejudice.

Grounds Fourteen, Eighteen, Twenty-Three, and Twenty-Seven: Failure to Investigate and Present Evidence

In these four Grounds for Relief, argued together, Blevins argues his trial counsel failed to adequately investigate and present evidence.

First of all, Blevins faults his counsels' failure to present his medical records, asserting they would have shown his inability to inflict the wounds suffered by the decedent (Merit Brief, Doc. No. 98, PageID 1591). The records in question were attached to the petition for post-conviction petition. They show that Blevins was treated for a gunshot wound to the right arm, resulting in a "comminuted fracture of the right humerus." (Discharge Summary, Feb. 17, 1991, from Good Samaritan Hospital, Cincinnati, attached to Return of Writ, Doc. No. 12, Ex. 12 PageID 119.) It indicates some nerve injury was possible, and an EMG to determine that would be necessary two to three weeks after discharge; there is no record of any follow-up. *Id*. The handwritten notes on this document are not part of the record and would have been inadmissible hearsay. The second page shows a temporary restriction on lifting with both arms as of April 2, 2002, at the Ohio Department of Corrections and Rehabilitation, after Petitioner was convicted and sentenced in this case. Had these two documents been before the jury, they would not have shown a permanent disability. And they would have required Blevins to explain how he got shot at close range in 1991. The court of appeals held Blevins had failed to show introduction of either of these documents would have likely affected the outcome of the trial *State v. Blevins,* No. C-030576 (Ohio App. 1st Dist. June 30, 2004)(unreported, copy attached to Return of Writ, Doc. No. 12, Ex. 17, PageID 224-225).

Second, Blevins faults his counsel for failure to call Letosha Frye as a witness (Merit Brief, Doc. No. 98, PageID 1591). In her Affidavit Frye says she knows an unidentified woman who knows a "boy" whose name Frye does not know who the other woman alleges was "part of that killing on 518 Hale Ave." (Frye Affidavit, attached to Return of Writ, Doc. No. 12, Ex. 11, PageID 112.) Although she doesn't know his name, she says she says she could pick him out of a line-up and she knows where he lives. *Id*. The Affidavit is dated and notarized May 15, 2001, about six weeks after the indictment. *Id*. Blevins now argues his attorney "could have simply put this information together" with Petitioner's own identification of Tony Smith as one of the assailants. But the gaps in the chain of inferences are great. Who was Ms. Frye's informant? Who does that informant say is the "boy" in question? Frye was not present at the murder scene and therefore could not identify this person. How does the informant know this "boy" was involved? If he admitted his involvement to her, then the informant could have testified to the admission, but not Ms. Frye. Or did she just hear it on the street that he was involved, making it further hearsay. Blevins says his attorney should have investigated, but even assuming he had shown no investigation of the possibility of calling Frye (which he did not do in the state court), he also has not shown that any such investigation would have yielded admissible exculpatory evidence. In other words, he has shown no prejudice from failure to call Frye. Given that conclusion, the state court determination that it was not ineffective assistance of trial counsel to fail to call Frye is not an objectively unreasonable application of *Strickland, supra*.

Third, Blevins faults his counsel for not calling Mike Grubbs, an inmate at the Hamilton County Justice Center who had conversations with Tony Smith who "essentially admitted to the murder and expressed his concerns that Mr. Blevins had witnessed Mr. Smith's involvement." (Merit Brief, Doc. No. 98, PageID 1592). The post-conviction petition was supported by an undated, unsigned, unnotarized statement[1] purporting to be from someone named Mike Grubbs. Allegedly Smith attempted to hire another inmate to attack an unidentified inmate referred to as "Black man" so that Smith can have Black man's legal papers stolen "cause Tony knew Black man was gonna tell on him." Is "Black man" Mr. Blevins? Blevins is identified by name in the same statement. If Blevins is "Black man," then Grubbs says Blevins told him to "stay out of it." Where did this statement come from? The statement speaks of the robbery of someone named "Wally," but the victim of the crime for which Blevins was convicted was nicknamed "Rob." As with Frye, the state courts concluded that calling Grubbs as a witness would not likely have affected the outcome of the trial and it was therefore not ineffective assistance of trial counsel. Petitioner has not shown that it was an objectively unreasonable application of *Strickland* and its progeny.

Last, Blevins faults his counsel for not calling Dan Krane, a DNA expert who "has opined that the DNA evidence was not properly investigated." (Merit Brief, Doc. No. 98, PageID 1592.) Dr. Krane provided an Affidavit in post-conviction in which he avers that if he had been called to

1 Petitioner referred to this statement as an affidavit in his post-conviction petition (Return of Writ, Doc. No. 12, Ex. 11, PageID 100), but it certainly is not an affidavit in the form required by Ohio Revised Code § 2953.21.

testify at trial, he would have noted that the blood sample taken from the murder weapon, a knife, had a "minor component" testified by the State's witness to be consistent with Mr. Blevins DNA. (Krane Affidavit, Return of Writ, Doc. No. 12, Ex. 11, PageID 116, ¶ 5.) He would have testified about "the difficulties associated with interpreting DNA profile mixtures – particularly those involving minor contributors to a sample." *Id*. He could further have testified about procedures for collection of DNA evidence, problems with collection, and problems associated with testing results. He could also have run independent tests of the samples actually collected, both those that were tested and those that were not. *Id.*

Dr. Krane's Affidavit is not in itself exculpatory. While he does not mention it, the major component of the blood on the murder weapon was that of the victim. Dr. Krane does not opine that the testing done by the State incorrectly identified Blevins' blood on the knife or any actual errors made by the State in collecting and testing samples. He could of course have done testing of more samples than the State tested. There were plenty of samples available – several people involved with the case have described it as the bloodiest they had ever seen. Dr. Krane's testimony, assuming it would have been the same as in his Affidavit, would have been cautionary, not directly exculpatory. The state courts' conclusion that failure to call Dr. Krane or someone who would have given similar testimony was not ineffective assistance of trial counsel is not an objectively unreasonable application of *Strickland, supra*.

Grounds Fourteen, Eighteen, Twenty-Three, and Twenty-Seven will be dismissed with prejudice.

Grounds Twenty-Eight and Thirty-Four: Failure to Object and Cross-Examine

In these two Grounds for Relief, Mr. Blevins faults his trial attorney for failing to properly cross-examine certain witnesses or object to irrelevant and prejudicial testimony they gave (Curtis Buckley and General Smith). He also asserts ineffective assistance of trial counsel in counsel's failure to object to prosecutorial misconduct (Merit Brief, Doc. No. 98, PageID 1593-1595).

Respondent objects that these claims are procedurally defaulted because they are apparent on the face of the record and should have been raised on direct appeal (Respondent's Merit Brief, Doc. No. 99, PageID 1606).

The procedural default defense in habeas corpus is described by the Supreme Court as follows:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an adequate and independent state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause of the default and actual prejudice as a result of the alleged violation of federal law; or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991); *see also Simpson v. Jones,* 238 F.3d 399, 406 (6th Cir. 2000). That is, a petitioner may not raise on federal habeas a federal constitutional right he could not raise in state court because of procedural default. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Engle v. Isaac*, 456 U.S. 107, 110 (1982). Absent cause and prejudice, a federal habeas petitioner who fails to comply with a State's rules of procedure waives his right to federal habeas corpus review. *Boyle v. Million*, 201 F.3d 711, 716 (6th Cir. 2000); *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Engle*, 456 U.S. at 110; *Wainwright*, 433 U.S. at 87. *Wainwright* replaced the "deliberate bypass" standard of *Fay v. Noia*, 372 U.S. 391 (1963). *Coleman*, 501 U.S. at 724.

Failure to raise a constitutional issue at all on direct appeal is subject to the cause and prejudice standard of *Wainwright v. Sykes*, 433 U. S. 72 (1977). *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Mapes v. Coyle*, 171 F.3d 408, 413 (6th Cir. 1999); *Rust v. Zent*, 17 F.3d 155 (6th Cir. 1994); *Leroy v. Marshall*, 757 F.2d 94 (6th Cir. 1985). Failure to present an issue to the state supreme court on discretionary review constitutes procedural default. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999). "Even if the state court failed to reject a claim on a procedural ground, the petitioner is also in procedural default 'by failing to raise a claim in state court, and pursue that claim through the state's ordinary appellate procedures.'" *Thompson v. Bell*, 580 F.3d 423 (6th Cir. 2009), *citing Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006).

The Sixth Circuit Court of Appeals requires a four-part analysis when the State alleges a habeas claim is precluded by procedural default. *Guilmette v. Howes*, 624 F.3d 286, 290 (6th Cir. 2010)(*en banc*); *Eley v. Bagley*, 604 F.3d 958, 965 (6th Cir. 2010); *Reynolds v. Berry*, 146 F.3d 345, 347-48 (6th Cir. 1998), *citing Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986); *accord Lott v. Coyle*, 261 F.3d 594, 601-02 (6th Cir. 2001); *Jacobs v. Mohr*, 265 F.3d 407, 417 (6th Cir. 2001).

> First the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule.
>
> . . . .
>
> Second, the court must decide whether the state courts actually enforced the state procedural sanction, citing *County Court of Ulster County v. Allen*, 442 U.S. 140, 149, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).
>
> Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim.

> Once the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate under *Sykes* that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

*Maupin,*785 F.2d at 138.

As noted above in the procedural history of the case, none of these claims was raised on direct appeal where the assignments of error were lack of sufficient evidence and verdict against the manifest weight of the evidence. The claims were presented for the first time in Petitioner's petition for post-conviction relief (Return of Writ, Doc. No. 12, Ex. 11, PageID 102-105). The trial court rejected the claim on the basis that it was barred by *res judicata* under *State v. Perry*, 10 Ohio St. 2d 175 (1967)(Findings and Conclusions, Return of Writ, Doc. No. 12, Ex.14, PageID 155). The court of appeals affirmed on the same basis. *State v. Blevins*, No. C-030576 (Ohio App. 1st Dist. June 30, 2004)(unreported, copy attached to Return of Writ, Doc. No. 12, at Ex. 17, PageID 224-225).

Ohio does have a procedural rule that claims which can be raised on direct appeal because they are evidenced by the record are barred by *res judicata* from being raised later in, for example, a petition for post-conviction relief. That doctrine is embodied in *Perry, supra*. The *Perry* rule has been repeatedly upheld in the Sixth Circuit as an adequate and independent state rule. *White v. Mitchell*, 431 F.3d 517 (6th Cir. 2005), *citing Monzo v. Edwards*, 281 F.3d 568, 577 (6th Cir. 2002); *Byrd v. Collins*, 209 F.3d 486, 521-22 (6th Cir. 2000), *cert. denied*, 531 U.S. 1082, 121 S.Ct. 786, 148 L.Ed.2d 682 (2001); *Rust v. Zent*, 17 F.3d 155, 160-61 (6th Cir. 1994); *Van Hook v. Anderson*, 127 F. Supp. 2d 899 (S.D. Ohio 2001).

Blevins does not offer any excusing cause or prejudice. These Grounds for Relief are therefore barred by his procedural default in presenting the claims to the state courts.

Ground Thirty-One: Ineffective Assistance of Appellate Counsel

Blevins next argues that his appellate counsel was ineffective for failing to plead assignments of error regarding trial counsel's ineffectiveness and regarding prosecutorial misconduct (Merit Brief, Doc. No. 98, PageID 1595). It is clear from the record that appellate counsel did not raised the claims recited and that Blevins presented those claims to the Ohio court of appeals in the manner prescribed by Ohio law, to wit, by application for reopening under Ohio App. R. 26(B).

The Warden argues this Ground for Relief is also procedurally defaulted by Blevins' failure to properly appeal to the Ohio Supreme Court from denial of 26(B) application by not signing his affidavit of indigency. This Court had previously held that Respondent had not shown that the appeal was rejected pursuant to an Ohio procedural rule which was regularly followed and enforced. In his Merit Brief, Respondent cites text of the Ohio Supreme Court Rules of Practice which require that an affidavit be executed and the affidavit of indigency clearly was not. One would not expect to see case law deciding whether or not to enforce this rule and comity compels us, in the absence of any evidence from Petitioner to the contrary, to presume the Ohio Supreme Court means its Rules of Practice to be taken seriously. Certainly on its face the rule is independent of whether the claims being appealed are matters of federal law or not. Therefore on the basis asserted by Respondent, the Court finds the claim of ineffective assistance of appellate counsel to be procedurally defaulted.[2]

If the claim were not procedurally defaulted, the merits question would be whether the decision of the court of appeals on this claim was contrary to or an objectively unreasonable application of Supreme Court precedent. Before reaching the merits, in denying the application to reopen, the court of appeals struck as untimely Blevins' *pro se* additions to the application which included his complaint about failure of appellate counsel to complain of trial counsel's failure to object to prosecutorial misconduct. *State v. Blevins,* No. C-020068 (Ohio App. 1st Dist. Aug. 19, 2003)(unreported, copy at Return of Writ, Doc. No. 12, Ex. 28, PageID 386-387). In doing so, it cited to the well-established Ohio rule that an application to reopen must be filed within 90 days of the judgment sought to be reopened and prohibiting successive attempts to reopen. *Id.* at PageID 3888, n.1, *citing* Ohio R. App. P. 26(B)(1) and *State v. Peoples,* 73 Ohio St. 3d 149 (1995). Thus that claim is separately procedurally defaulted by failure to include it in the original timely 26(B) application.

With respect to the claim that appellate counsel was ineffective for failure to complain of trial counsel's failure to adequately cross-examine certain witnesses, the court of appeals held that this claim would depend, at least in part, on evidence outside the record which would have to be presented in a petition for post-conviction relief, and not on direct appeal. *State v. Blevins,* No. C-020068 (Ohio App. 1st Dist. Aug. 19, 2003)(unreported, copy at Doc. No. 12-28, PageID 386-387). Since it could not have been presented on direct appeal, it cannot have been ineffective assistance of appellate counsel to have failed to thus present it. Current counsel's arguments about what would have been learned on cross assume that it would have been discrediting to at

[2] In considering this claim, the Court has not and cannot consider the deposition testimony of appellate counsel, under the authority of *Pinholster, supra*.

least General Smith (Merit Brief, Doc. No. 98, PageID 1594). But even assuming that counsel is correct, it has not been shown that trial counsel knew such discrediting testimony would have been elicited. To have asked the questions without knowing the answers would have violated the oldest rule of cross-examination. If it was later learned what would have been elicited from Smith, then the court of appeals is correct that that could not have been raised on direct appeal but would have to have been a part of the petition for post-conviction relief. Therefore the decision of the court of appeals on this point is neither contrary to nor an unreasonable application of *Strickland* and its progeny.

With respect to Blevins' claim that his appellate counsel was ineffective for failure to complain of trial counsel's failure to object to prior bad acts evidence (Merits Brief, Doc. No. 98, PageID 1594-1595), this portion of the claim is procedurally defaulted because the failure to object would have been apparent on the face of the record, but this claim was not raised on direct appeal and is therefore procedurally defaulted under *Perry*, *supra*.

As to that portion of Ground Thirty-One which complains of appellate counsel's failure to object to other asserted instances of prosecutorial misconduct, that claim is not contained in the Rule 26(B) application filed by counsel and therefore not ruled on by the court of appeals. It is procedurally defaulted for failure to include it in the original 26(B) application.

The Court accordingly concludes that Ground Thirty-One is either procedurally defaulted or the court of appeals' decision rejecting these claims is not an objectively unreasonable application of Supreme Court precedent.

Grounds Five and Six: Prosecutorial Misconduct

In his Fifth and Sixth Grounds for Relief, Blevins asserts the prosecutor engaged in misconduct by making personal comments on the credibility of Mr. Blevins and by commenting on his exercise of his privilege against self-incrimination.

These claims are procedurally defaulted because they could have been raised on direct appeal – since they depend on the record on appeal – but were omitted from the pled assignments of error. Had they been raised on direct appeal, it is likely the court of appeals would have found them procedurally defaulted under Ohio's contemporaneous objection rule by trial counsel's failure to object.

Moreover, this Court discerns no prosecutorial misconduct. The prosecutor is not commenting on Blevins' silence, but on the fact that he spoke falsely, accounting for the blood on his person by saying he had been shot when he had not been shot. While a criminal defendant has the right to remain silent, he does not have the right to make up demonstrably false accounts of his involvement and then prevent the State from demonstrating and commenting on the falseness.

Grounds Five and Six will be dismissed with prejudice.

Grounds Thirty: Insufficient Evidence

In his Thirtieth Ground for Relief, Blevins claims his conviction is not supported by sufficient evidence (Merit Brief, Doc. No. 98, PageID 1598).[3] In arguing this claim, counsel

3 In this portion of the Merit Brief, Petitioner's counsel argues the 29th Ground for Relief as if it also made a claim of

relies on the facts averred by Blevins in his Affidavit in support of post-conviction relief, but those facts were not before the jury and cannot be considered in determining this question.

This was the first assignment of error raised on direct appeal. That court held:

> [*P1] Defendant-appellant Charles Blevins appeals his conviction for murder, for which he was sentenced to 15 years to life in prison. Blevins argues that the evidence presented at his trial was insufficient to convict him and that his conviction was against the manifest weight of the evidence. We affirm.
>
> [*P2] The victim in this case was 19-year-old Robert White. At Blevins's trial, the state offered the following testimony and evidence.
>
> [*P3] Curtis Buckley, a friend of White's, testified that White sold drugs out of his apartment on Hale Avenue in Avondale. On the evening that he died, White made several drug sales in his apartment to various customers. Buckley, who was in the apartment with White for most of the evening, testified that White had a large amount of cash in the apartment, which White kept in two wads of bills. Buckley testified that Blevins visited White two times that night. The first time, Blevins attempted to trade heroin for crack cocaine, but White refused. About 45 minutes later, Blevins returned with a woman. Blevins and White went into a back room to talk for about five minutes, and then Blevins and the woman left. Buckley left soon after.
>
> [*P4] Gwendolyn Barden, a neighbor of White's who frequently bought drugs from him, testified that she visited White's apartment several times that evening. The first time, she passed Blevins in the hallway of White's building. Blevins turned around and accompanied Barden towards White's apartment, but did not go in with her. The second time, Blevins was again standing in the hallway, near White's door. White allowed Barden in, but asked Blevins to wait outside. The third time Barden went to White to buy crack cocaine, she went with two other women. As the women were leaving White's apartment, there was a knock at the door, and White opened the door to find Blevins. Barden testified that about a half

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insufficient evidence. On its face, however, the 29th Ground asserts the conviction is against the manifest weight of the evidence. However, a manifest weight claim is purely a matter of state law and is not cognizable in federal habeas corpus. See *State v. Thompkins,* 78 Ohio St. 3d 380 (1997).

hour after she left White the third time, she was stopped by someone on the street who told her that White "'must have had a fight with his woman.' He said, 'Blood everywhere. He cut all up.'"

[*P5] Two other neighbors of White testified about that night. Conrad Hassell, whose apartment was directly below White's, was awakened, between 4:00 and 5:00 AM, by noise in the apartment above. Hassell testified that he heard a lot of rambling around, with somebody going from one end of the room to another, and then "a crash like something hit ground real hard." Hassell called the police and went back to sleep.

[*P6] White's neighbor across the hallway, Brian Jordan, testified that he also was awakened around 4:30 AM by loud noises. Jordan testified that he heard two voices arguing, White's and another person's. The other person said, "I want my money," and then there were loud sounds of something being thrown and hitting the floor. Jordan then heard the other person say, "You got yours like I got mine." Jordan waited 15 or 20 minutes and then looked out his apartment door into the hallway. He saw a trail of blood from White's apartment along the hallway floor. Jordan did not call the police, but went back to sleep.

[*P7] Lucinda Holly testified that, at about 5:00 AM, Blevins, a friend of her brother's, knocked on the door of her house. Holly's brother, Edward, and his girlfriend, Latisha Bell, answered the door, and Blevins told them that some men had robbed him and shot him. They offered to take him to a hospital, but Blevins wanted a ride to Westwood. Bell said she would take Blevins. During the ride, Bell noticed that Blevins was no longer clutching his stomach where he was allegedly "shot," but was instead counting money, mostly $ 20 bills, in a wad. She also noticed the money was bloody. While counting the money, Blevins said, "My nigger is fucked up worse than me." Blevins decided he wanted to go to Winton Place instead of Westwood, and when he got out of the car, he paid Bell $ 20, said, "You don't know me and I don't know you, if anybody asks you," and then ran away. Blevins was arrested in Columbus about one month later.

[*P8] At about 6:30 AM, Cincinnati Police Officer Gary Christie responded to a call reporting a disturbance in White's apartment and discovered White's body in a pool of blood, with numerous stab wounds. Cincinnati Police Criminalist Ron Camden testified that the crime scene in White's apartment was "one of the top two or three of the worse looking crime scene reference to the amount of carnage" that he had seen in 19 years of working on homicide crime scenes.

[*P9] Camden testified that the scene was "totally filled with blood and destruction" for the entire 30-foot length of the apartment. There was a significant amount of blood in the kitchen, the living room, and the bedroom - every room except the bathroom. There was blood on the walls, spattered on windows and sills, and pooled on the floor, the furniture, and the bedding. Blood was in the hallway outside White's apartment, on his apartment door, down the stairwell, and out the door onto the sidewalk. Camden testified that, in his opinion and experience, the evidence at the scene indicated that a fierce struggle had taken place between two individuals - White and his killer.

[*P10] Police collected evidence, including a bloody knife bent nearly in half, seven pieces of crack cocaine, and photographs of bloody shoe prints. In addition, police took samples from the many spots of blood in the apartment, the hallway, and outside on the sidewalk.

[*P11] Hamilton County Coroner's Office Criminalist Joan Burke testified that DNA testing done on the knife found in White's apartment revealed a mix of blood from more than one individual. The major DNA profile on the knife, meaning the largest quantity of blood, was consistent with the DNA profile of White. The minor DNA profile on the knife was consistent with the DNA profile of Blevins. In addition, Burke testified that all the blood swabs that were analyzed - from White's kitchen, from the steps outside the door, and from the sidewalk outside the apartment building - were consistent with Blevins's DNA profile.

[*P12] Dr. Utz, the deputy coroner who performed the autopsy on White, testified that White's internal and external jugular veins were cut, but that the actual cause of death was a stab wound in the chest that penetrated the pericardial sack around the heart. Utz testified that there were other stabbing injuries and defensive cuts. Utz also testified that the wounds on White were consistent with wounds caused by the knife found in White's apartment.

[*P13] Blevins now raises two assignments of error - that the state presented insufficient evidence to convict him, and that his conviction was against the manifest weight of the evidence. The

> legal concepts of sufficiency of the evidence and weight of the evidence are distinct. *See State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997 Ohio 52, 678 N.E.2d 541. A challenge to the sufficiency of the evidence attacks the adequacy of the evidence presented. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Id*. The relevant inquiry in a claim of insufficiency is whether any rational factfinder, viewing the evidence in a light most favorable to the state, could have found the essential elements of the crime proven beyond a reasonable doubt. See State v. Jones, 90 Ohio St.3d 403, 417, 2000 Ohio 187, 739 N.E.2d 300; State v. Jenks (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492.
>
> [*P14] [Standard for manifest weight claim omitted.]
>
> [*P15] The state's evidence showed that White and Blevins interacted several times on the night of White's murder. Blevins attempted to buy drugs from White, but was refused on at least one occasion. Several witnesses heard a loud struggle in White's apartment, with a voice saying, "I want my money." Soon after, Blevins, claiming to have been robbed and shot, showed up at a friend's house needing a ride. During the ride, he was seen counting a large stack of cash with blood on it. He volunteered, "My nigger is fucked up worse than me." Police and criminalists testified that Blevins's blood was the minor DNA profile on a knife that was consistent with the fatal stab wounds on White. Blevins's blood was in the kitchen of White's apartment, outside the door in the hallway, and out on the sidewalk.
>
> [*P16] After reviewing the entire record, weighing the evidence and all reasonable inferences, and considering the credibility of the witnesses, we conclude that there was substantial and credible evidence to prove all essential elements of the crime and to support the jury's verdict. The evidence was legally sufficient to sustain Blevins's conviction, and Blevins's conviction was not against the manifest weight of the evidence. Accordingly, Blevins's first and second assignments of error are overruled, and the trial court's judgment is affirmed.

State v. Blevins, 2002 Ohio 7335, 2002 Ohio App. LEXIS 7227 (Ohio App. 1st Dist. Dec. 31, 2002).

An allegation that a verdict was entered upon insufficient evidence states a claim under the

Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Jackson v. Virginia*, 443 U.S. 307 (1979); *In re Winship*, 397 U.S. 358 (1970); *Johnson v. Coyle*, 200 F.3d 987, 991 (6th Cir. 2000); *Bagby v. Sowders*, 894 F.2d 792, 794 (6th Cir. 1990)(en banc). In order for a conviction to be constitutionally sound, every element of the crime must be proved beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364.

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt . . . . This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence and to draw reasonable inferences from basic facts to ultimate facts.

Jackson v. Virginia, 443 U.S. at 319; *United States v. Paige*, 470 F.3d 603, 608 (6th Cir. 2006); *United States v. Somerset*, 2007 U.S. Dist. LEXIS 76699 (S.D. Ohio 2007). This rule was recognized in Ohio law at *State v. Jenks*, 61 Ohio St. 3d 259, 574 N.E. 2d 492 (1991). Of course, it is state law which determines the elements of offenses; but once the state has adopted the elements, it must then prove each of them beyond a reasonable doubt. *In re Winship, supra.*

In cases such as Petitioner's challenging the sufficiency of the evidence and filed after enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No 104-132, 110 Stat. 1214)(the "AEDPA"), two levels of deference to state decisions are required:

> In an appeal from a denial of habeas relief, in which a petitioner challenges the constitutional sufficiency of the evidence used to convict him, we are thus bound by two layers of deference to groups who might view facts differently than we would. First, as in all sufficiency-of-the-evidence challenges, we must determine whether, viewing the trial testimony and exhibits in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). In doing so, we do not reweigh the

> evidence, re-evaluate the credibility of witnesses, or substitute our judgment for that of the jury. See *United States v. Hilliard*, 11 F.3d 618, 620 (6th Cir. 1993). Thus, even though we might have not voted to convict a defendant had we participated in jury deliberations, we must uphold the jury verdict if any rational trier of fact could have found the defendant guilty after resolving all disputes in favor of the prosecution. Second, even were we to conclude that a rational trier of fact could not have found a petitioner guilty beyond a reasonable doubt, on habeas review, we must still defer to the state appellate court's sufficiency determination as long as it is not unreasonable. See 28 U.S.C. § 2254(d)(2).

Brown v. Konteh, 567 F.3d 191, 205 (6th Cir. 2009). In a sufficiency of the evidence habeas corpus case, deference should be given to the trier-of-fact's verdict under *Jackson v. Virginia* and then to the appellate court's consideration of that verdict, as commanded by AEDPA. *Tucker v. Palmer*, 541 F.3d 652 (6th Cir. 2008).

> We have made clear that *Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference. First, on direct appeal, "it is the responsibility of the jury -- not the court -- to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." *Cavazos v. Smith*, 565 U. S. 1, ___, 132 S. Ct. 2, 181 L. Ed. 2d 311, 313 (2011) (*per curiam*). And second, on habeas review, "a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was 'objectively unreasonable.'" *Ibid.* (quoting *Renico v. Lett*, 559 U. S. ___, ___, 130 S. Ct. 1855, 176 L. Ed. 2d 678 (2010) (slip op., at 5)).

Coleman v. Johnson, 566 U.S. ___, 566 U.S. ___, 132 S. Ct. 2060, 182 L. Ed. 2d 978 (2012)(*per curiam).*

A habeas court cannot consider post-trial evidence in deciding a *Jackson v. Virginia* claim. *McDaniel v. Brown*, 558 U.S. ___, 130 S. Ct. 665, 670; 175 L. Ed. 2d 582 (2010).

Considering the facts recited from testimony by the court of appeals and disregarding, as we must under McDaniel, Mr. Blevins' post-trial affidavit, the Court concludes that the court of appeals decision on direct appeal is neither contrary to nor an objectively unreasonable application of *Jackson v. Virginia*. Petitioner's Thirtieth Ground for Relief is without merit and will be dismissed with prejudice.

Grounds for Relief Not Argued by Counsel

Grounds One, Two, Four, Five, Six, Nine, Eleven, Twelve, Fifteen, Sixteen, Seventeen, Eighteen, Twenty-Two, Twenty-Four, Twenty-Five, and Twenty-Eight

The Warden asserts that all of sixteen of these claims are barred by Petitioner's procedural default in failing to raise them on direct appeal when they are based on the appellate record (Return of Writ, Doc. No. 12).

Blevins filed a 71-page Traverse in response to the Return of Writ (Doc. No. 22). This document is absolutely rife with Petitioner's assertions of fact which are not supported by the record or at least by record references. For example, at PageID 456 Blevins claims that he never told witness Litisha Bell he had been shot as an explanation for all the blood on him, but he did not testify to contradict her testimony nor is such a contradiction found in his affidavit in support of post-conviction relief. Much of the Traverse also consists of Blevins' argument with the State's evidence. For example, Blevins asserts General Smith was a planted FBI, but offers no record reference to proof of that assertion informant (Doc. No.22, PageID 466).

In many places in the Traverse, Mr. Blevins asserts the need for an evidentiary hearing in federal court on his many claims. However, the Supreme Court made very clear in *Cullen v. Pinholster, supra*, that a habeas court may not consider evidence not before the state courts in deciding whether the state court decision was an objectively unreasonable application of Supreme Court precedent.

Blevins asserts that a hearing is required because the state court record is inaccurate or not before the Court. *Id*. at PageID 480. However, when presented with a request to expand the record by appointed counsel to include Blevins' affidavit, the Court agreed. No other inaccuracies have been pointed out although Mr. Blevins has had five appointed counsel in this habeas case.

In sum, in the portion of his Traverse devoted to this assertion of procedural default, Blevins presents nothing which overcomes the Warden's argument as to these Grounds for Relief: they could have been raised on direct appeal and were not. They are therefore procedurally defaulted under the Ohio criminal *res judicata* doctrine in *State v. Perry, supra*.

Grounds Three, Seven, Eight, Ten, Thirteen, Fourteen, Nineteen, Twenty, Twenty-One, Twenty-Three, Twenty-Six, and Thirty-Two

The Warden asserts these twelve Grounds for Relief are procedurally defaulted because they were never fairly presented to the Ohio courts (Return of Writ, Doc. No. 12, PageID 312.) The Warden asserts that they are just mentioned without complete argument in Blevins' *pro se* motion to amend his post-conviction petition. Blevins himself makes no response to this defense in his Traverse other than a demand that the State turn over "withheld" blood samples for testing

(Traverse, Doc. No. 22, PageID 481). As set forth above, the trial court eventually found that this amendment was untimely, thereby reinforcing the State's defense. This Court concludes the claims are procedurally defaulted.

Ground Twenty-Seven: Ineffective Assistance of Trial Counsel for Failure to Call Stephanie Dangerfield as a Witness

In his Twenty-Seventh Ground for Relief, Petitioner asserts his trial counsel was ineffective for failing to call Stephanie Dangerfield as a defense witness. The Warden concedes this claim is preserved for merit review by the fact that it was included in the petition for post-conviction relief (Return of Writ, Doc. No. 12, PageID 319-320). Both state courts rejected the claim.

There is no affidavit from Dangerfield attached to the post-conviction petition. In the body of the Petition, counsel represented:

> Ms. Dangerfield, a listed State witness, was the girlfriend of the deceased, Robert White. Dangerfield could have testified as to the relationship between the Petitioner and White: that they were friends, that the Petitioner was at White's home frequently and had access to the home, and that they did not fight with each other. Had the jury been presented with this evidence, they would have found the State's theory of the Petitioner turning on White for money much harder to believe.

(Return of Writ, Doc. No. 12, Ex. 11, PageID 100.) In the absence of some showing that Ms. Dangerfield would actually have testified in this way, counsel's comments are purely speculative. A trial attorney might reasonably be suspicious of calling a person actually listed on the State's witness list without some positive indication from her that her testimony would be favorable.

Therefore the state courts' conclusion that it was not ineffective assistance of trial counsel to fail to call her is not an objectively unreasonable application of *Strickland* and its progeny.

Conclusion

Based on the foregoing analysis, it is hereby ORDERED that the Clerk enter judgment dismissing the Petition herein with prejudice. Furthermore, the Court concluding that reasonable jurists would not disagree with this conclusion, Petitioner is denied a certificate of appealability and this Court certifies to the Sixth Circuit Court of Appeals that any appeal would be objectively frivolous.

s/ *Michael R. Merz*
United States Magistrate Judge